

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of JOHN W. FINDLEY and DEPARTMENT OF THE ARMY,  
U.S. ARMY MISSILE COMMAND, St. Louis, Mo.

*Docket No. 96-2472; Submitted on the Record;  
Issued September 3, 1998*

---

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a visual melanoma in the performance of duty as alleged; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for further review on the merits under 5 U.S.C. § 8128(a).

On March 1, 1993 appellant, then a 59-year-old former employee of the U.S. Department of the Army, filed a notice of occupational disease and claim for compensation, Form CA-2, alleging that his hearing and visual loss arose in the performance of his duties. He indicated that his hearing loss was caused by the constant exposure to aircraft noise and that his loss of vision was due to malignant melanoma which arose in the performance of his duty.

In a May 16, 1989 report, Dr. Vernon C. Parmley, a Board-certified ophthalmologist, advised that appellant was first diagnosed as having a posterior malignant melanoma in his right eye in 1983, and underwent iridium-192 plaque treatment. Dr. Parmley indicated that while the tumor slowly regressed, appellant's visual acuity had deteriorated secondary to radiation retinopathy changes involving the macula. Medical notes advised of appellant's exposure to Agent Orange in Vietnam in 1968 and 1969.

The evidence of record reflects that appellant was employed as an aircraft maintenance instructor for rotary wing aircraft from 1961 to 1968, and continued working around aircraft through 1983. He was exposed to noise from gas turbines and rotary wing motors continuously while at work. He also was assigned to units in Vietnam on two occasions.

The Office referred appellant for second opinion evaluations pertaining to his hearing and vision claims. Dr. Timothy Gannon, a Board-certified otolaryngologist, reviewed the medical evidence pertaining to appellant's hearing problems, performed an evaluation, and had audiological testing performed on September 14, 1994. Based on that evaluation, the Office

determined that appellant had a hearing loss which arose in the performance of his duties, and a schedule award for a 37 percent binaural hearing loss was issued.

In a September 21, 1994 report, Dr. J. Kenneth Wallace, a Board-certified ophthalmologist, reviewed the medical evidence and performed an evaluation of appellant on September 16, 1994. He noted that a tumor was found in June 1983, typical for malignant melanoma, and that treatment consisted of iridium-192 plaque. However, appellant's visual acuity progressively declined due to radiation retinopathy, which was fairly common given the posterior extent of the tumor. Dr. Wallace advised that there is no known precipitating cause for melanoma, and it is generally assumed that the melanoma is a malignant transformation of a preexisting nevus. Dr. Wallace further stated that appellant "has a history of exposure to Agent Orange in Vietnam and specifically relates that in this interview. He states that, while he did not have direct contact with the chemical agent, he knows that he was 'around it' during his employment as a maintenance support personnel for the Army helicopters." Dr. Wallace opined that there were no known causes or factors which would make a malignant melanoma form or, if already present, would aggravate the condition.

By decision dated October 26, 1994, the Office denied appellant's claim for visual loss as the evidence failed to establish that his condition arose in the performance of duty.

On October 31, 1994 appellant requested an oral hearing.

On July 12, 1995 appellant testified that he was quasi-military and worked in the field with the GI's and officers in Vietnam in 1968, 1969, and 1971. He had to maintain the helicopters and that, while working on these machines, he was exposed to whatever was being hauled by the helicopters. They wore no protective clothing. Appellant provided copies of articles from the American Legion magazine wherein comments and opinions were given that exposure to Agent Orange in Vietnam may be the cause for Hodgkins Disease and melanomas found in veterans. Concerning his condition, appellant stated that he has no known cancers in his family, which includes five sisters and a brother. He felt strongly that his cancer came from his Vietnam experience. Appellant wanted the record to show that he was out in the fields with the soldiers in Vietnam and was exposed to the same things as the military personnel.

By decision dated September 21, 1995, the Office hearing representative affirmed the October 26, 1994 decision on the grounds that appellant failed to establish that the claimed condition arose in the performance of duty.

By letter dated May 30, 1996, appellant requested reconsideration and submitted newspaper clippings.

By decision dated June 13, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not new or relevant and, therefore, insufficient to warrant further review.

The Board finds that appellant has failed to meet his burden of proof in establishing that he sustained a visual melanoma in the performance of duty.

An employee seeking benefits under the Federal Employees' Compensation Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>1</sup> These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>2</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish causal relationship, generally, is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on this issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>3</sup>

In the instant case, it is not disputed that appellant has a malignant melanoma of his eyes or that he was in Vietnam and, therefore, possibly exposed to Agent Orange. Appellant, however, has submitted insufficient medical evidence to establish that his diagnosed condition is causally related to the employment factors or conditions, *i.e.*, possible exposure to Agent Orange. None of the physicians who treated appellant since 1983 have provided an opinion on the cause of appellant's visual tumor. Moreover, Dr. Wallace, the Office's second opinion physician, specifically opined that there was no known cause for appellant's condition, and could provide no connection to appellant's Vietnam experience. Thus, the medical reports of record are devoid of a rationalized medical opinion relating appellant's visual melanoma to the performance of his duties.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his condition was caused, precipitated or aggravated by his employment is

---

<sup>1</sup> *Jack Hopkins, Jr.*, 42 ECAB 818 (1991); *Ernest J. LeBreux*, 42 ECAB 736 (1991).

<sup>2</sup> *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>3</sup> *Id.*

sufficient to establish causal relationship.<sup>4</sup> Causal relationship must be established by rationalized medical opinion evidence. As such the physicians reports of file are of diminished probative value since none of them addressed the cause of appellant's condition.<sup>5</sup> The Office advised appellant of the type of evidence needed to establish his claim, however, appellant failed to submit such evidence. The Office, therefore, properly denied appellant's claim for compensation.

The Board further finds that the Office properly denied appellant's May 30, 1996 request for reconsideration under 5 U.S.C. § 8128.<sup>6</sup>

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.<sup>7</sup> The Office, through its regulations, has imposed a one-year time limitation for a request of review to be made following a merit decision of the Office.<sup>8</sup> The regulations provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law, or (2) advancing a point of law or a fact not previously considered by the Office, or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>9</sup> When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>10</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.<sup>11</sup> Evidence that does not address the particular issue involved, in this case the causal relationship between appellant's visual condition and his alleged exposure to Agent Orange in Vietnam, also does not constitute a basis for reopening a case.<sup>12</sup> Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions not previously considered, it is a matter of discretion on the part of the Office to reopen a case for further consideration under section 8128 of the Act.<sup>13</sup>

---

<sup>4</sup> *Id.*

<sup>5</sup> *See Id.*

<sup>6</sup> On appeal, appellant submitted an article from The American Legion magazine. The Board, however, is precluded from reviewing evidence submitted for the first time on appeal. 20 C.F.R. § 501.2(c).

<sup>7</sup> 5 U.S.C. § 8128(a); *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>8</sup> 20 C.F.R. § 10.138(b)(2).

<sup>9</sup> 20 C.F.R. § 10.138(b)(1).

<sup>10</sup> *Supra* note 4.

<sup>11</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

<sup>12</sup> *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

<sup>13</sup> *Gloria Scarpelli-Norman*, 41 ECAB 815 (1990); *Joseph W. Baxter*, 36 ECAB 228 (1984).

In its June 13, 1996 merit decision, the Office denied appellant's claim on the grounds that appellant failed to identify grounds upon which reconsideration was being requested. Specifically, the Office found that appellant's reconsideration letter neither raised substantive legal questions nor included new and relevant evidence.

In support of his May 30, 1996 request for reconsideration, appellant submitted newspaper clippings discussing studies on Agent Orange. The Board, however, has held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.<sup>14</sup> Therefore, this evidence does not pertain to the relevant issue of the case, *i.e.*, whether appellant has submitted sufficient rationalized medical evidence to establish that he sustained an employment-related injury. The Board has held that the submission of evidence which does not address the particular issue involved is of little probative value.<sup>15</sup>

Appellant has, therefore, not submitted any new and relevant medical evidence, advanced a point of law or fact not previously considered by the Office or shown that the Office erroneously applied or interpreted a point of law.

The decisions of the Office of Workers' Compensation Programs dated May 30, 1996 and September 21, 1995 are hereby affirmed.

Dated, Washington, D.C.  
September 3, 1998

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

Bradley T. Knott

---

<sup>14</sup> *William C. Bush*, 40 ECAB 1064, 1075 (1989).

<sup>15</sup> *Supra* note 8.

Alternate Member